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ABSTRACT

This report provides an account of public-interest law firm activities supported by the Ford Foundation. Public interest law is a phrase that describes efforts aimed at providing legal representation for underrepresented interests in the legal process. The report is arranged into four major sections. The first section, on the evolution of the concept of public interest law, discusses the provision of legal aid for little or no fee in cases involving poverty law, civil rights law, public rights law, the representation of charitable organizations, or the administration of justice. The second section discusses the Ford Foundation's relations with 16 public interest law firms. Cases handled by the firms cover such diverse areas an environmental protection, governmental reform, employment practices, voting rights, the regulation of the mass media and consumer protection, regulation of mental health and the rights of patients, women's rights, and international issues. Section three, dealing with concerns about public interest law activity, focuses on the role of courts as an appropriate forum, the effect of overburdening the judicial system, competing public interests, and adequate representation of all segments of the public. The concluding section looks at the future of public interest law over the next few years--probable sources of support, efforts to develop them, and new forms of dealing with social and economic problems including inequities that may emerge from present experience and practice. (Author/JB)

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PUBLIC INTEREST LAW:

Five Years Later

Ford Foundation

American Bar Association
Special Committee on
Public Interest Practice

MAY 18 1976

PUBLIC INTEREST LAW:
Five Years Later

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The American Bar Association owes a debt of gratitude to the private foundations which, without the initial assistance of the organized bar, fostered the growth of public interest law commencing in 1969 and developing to the point where now this activity contributes significantly to the overall pattern of the delivery of legal services to the citizens of our country.

This publication, the work of Sanford Jaffe, Esq., of the Ford Foundation, is designed to trace the growth of and to portray the worthwhile contributions of public interest law. It is presented jointly by the Ford Foundation and the American Bar Association's Special Committee on Public Interest Practice. The Committee hopes, by this publication, to aid in improving public understanding of the need for access to adequate legal representation.

Harry Hathaway,
Chairman
American Bar Association Special Committee
on Public Interest Practice

March 1976

Contents

Foreword — Thurgood Marshall	6
Evolution of the Concept	9
The Record	13
Ford Foundation Relations With Public Interest Law Firms	13
Record of Performance	14
Environmental and Consumer Protection	17
Reforming the Governmental Process	19
Fair Employment	20
Responsiveness of the Mass Media	22
Health and Mental Health	23
Women's Rights	24
International Issues	25
Education	26
Electoral Rights	27
Concerns About Public Interest Law	28
An Appropriate Forum?	28
Pressure on Court Calendars?	29
Competing Public Interests	30
Adequate Representation	31
The Future	33
Needs and Sources of Support	33
Fees	33
Public Subsidy	35
Support by the Organized Bar	37
Council for Public Interest Law	38
Foundation Support	39
Some Longer-Term Implications	40
Appendix	
American Bar Association Special Committee on Public Interest Practice—Recommendations	45
Public Interest Law Firms Supported by the Ford Foundation	50

Foreword

This is a timely report on an important subject concerning our legal system. "Public interest law" is a phrase that describes a wide variety of efforts aimed at providing legal representation for underrepresented interests in the legal process. These efforts are responsive to an enduring problem in our complex society: It is often impossible to protect or further important interests without legal help, yet many persons and groups do not have access to a lawyer.

This problem produces an imbalance and distortion in the legal process. Certain viewpoints do not have access to important decisionmakers. Decisions are made without benefit of an adversary presentation of all the facts and arguments. Significant injuries may go without remedy. Justice is parceled out unequally, and unwise decisions are made affecting all of us.

Public interest law seeks to fill some of the gaps in our legal system. Today's public interest lawyers have built upon the earlier successes of civil rights, civil liberties and legal aid lawyers, but have moved into new areas. Before courts, administrative agencies and legislatures, they provide representation for a broad range of relatively powerless minorities — for example, to the mentally ill, to children, to the poor of all races. They also represent neglected interests that are widely shared by most of us as consumers, as workers, and as individuals in need of privacy and a healthy environment.

These lawyers have, I believe, made an important contribution. They do not (nor should they) always prevail, but they have won many important victories for their clients. More fundamentally, perhaps, they have made our legal process work better. They have broadened the flow of information to decisionmakers. They have made it possible for administrators, legislators and judges to assess

the impact of their decisions in terms of all affected interests. And, by helping to open the doors to our legal system, they have moved us a little closer to the ideal of equal justice for all.

Although public interest law has grown and has gained wider acceptance, it still faces an uncertain future. The major problem is funding. Even though public interest lawyers usually will accept far lower salaries than they could earn representing well-to-do clients, substantial funds are necessary to make a highly professional public interest practice possible. Yet, almost by definition, public interest lawyers represent persons or groups who cannot easily compete in the ordinary market for legal services.

Until now, foundations and individuals have generously contributed to public interest law firms. Without this charitable support, public interest law would not have achieved its present strength and made its important contributions. It is to be hoped that this important support will continue.

Realistically, however, additional sources of funding must be tapped if public interest law is to continue to grow and attract talented lawyers, and if it is to become a permanent part of our legal landscape. If our society believes, as I believe, that all viewpoints should have access to the legal process, then we must search for ways to assure that public interest law develops a secure financial base. This is not a problem for the legal profession alone, but it is a problem which the legal profession has a special responsibility to address. The legal profession, after all, holds a monopoly on legal services and it has particular duties to see that our legal institutions operate fairly and effectively.

Elsewhere I have argued that the organized bar should move more decisively from rhetoric about equal justice to true commitment, and assume responsibility for supporting public interest practice on a permanent basis.* There are signs that the bar is slowly moving in such a direction. The joint publication of this report by the American Bar Association's Special Committee on Public Interest Practice and the Ford Foundation is one such sign. I hope that this report will stimulate greater efforts to achieve the ideals of our profession and our society.

Justice Thurgood Marshall
Supreme Court of the United States

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*Financing Public Interest Law Practice: The Role of the Organized Bar, 61 A.B.A.J. 1487 (1975).

Evolution of the Concept

When the Ford Foundation began its program of support of public interest law in 1970, public interest law was defined as "representation of the unrepresented and underrepresented." Public interest law had other characteristics as well: an orientation toward test cases; an interest in non-money damage remedies; an emphasis on opening up and improving government operations; a concentration on the administrative process, and a clientele not necessarily indigent but lacking the resources for effective representation on issues of broad concern to the community (for example, the environment and consumer affairs).*

Today, five years later, public interest law is viewed in much the same way by courts and administrative agencies, in Internal Revenue Service guidelines, and by the organized bar. In August 1975, for example, the American Bar Association approved a resolution that defined public interest law as:

> Legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:
>
> 1. Poverty Law
> 2. Civil Rights Law
> 3. Public Rights Law
> 4. Charitable Organization Representation
> 5. Administration of Justice.**

This ABA's definition emerged from a historical context in which the commonality of these various forms of legal representation has

*For an analysis of the emergence of public interest law activity and an account of earlier Ford Foundation involvement, see *The Public Interest Law Firm: New Voices for New Constituencies*, Ford Foundation, February, 1973.

**See Appendix, page 45.

been recognized. The right of the indigent to legal representation has long been acknowledged as deriving from the most elementary sense of professional ethics and regard for the adversary system. Defense of individual civil rights was an extension of this principle, since those whose rights were most often in jeopardy were minorities, who usually tended also to be poor, and advocates of unpopular causes or ideas. The representation of charitable organizations is justified by the fact that, because society values these groups, there is an obligation to defend them against adversity. What is new in the definition is the category "public rights law," which encompasses the bulk of the practice of public interest law firms and is defined as:

> Legal representation involving an important right belonging to a significant segment of the public . . . where society needs to have its right vindicated but as a practical matter the would-be plaintiff or defendant will take action to vindicate or defend those rights only if he receives aid, and does not have to bear the cost himself.

In practice, civil rights litigation, especially as managed by the National Association for the Advancement of Colored People, was very different from legal aid. The latter was offered to the poor on the assumption that the existing system of law would assure justice provided all had access to it. Civil rights practice, on the other hand, was based on the assertion that the system was not sympathetic to the interests of minorities. It sought to remove barriers to equal treatment that were rooted in law and custom and thereby to establish a broad legal base for political, economic, and social parity. One of the means—test cases to attack class discrimination—was used by the NAACP Legal Defense Fund, Inc., which was established in 1939. The fund's victories in the 1950s and 1960s helped to lay the groundwork for subsequent public interest practice. (Other organizations that successfully used test-case litigation were the American Civil Liberties Union, the Office of Economic Opportunity Legal Services program, and legal defense groups formed by Native Americans, Mexican Americans, and Puerto Ricans.)

During the 1960s, too, other groups sharing interests that cut across ethnic or economic considerations—environmental, consumer, and health issues, for example—began to make claims on an economic and political system they believed to be unresponsive to their concerns. Ralph Nader was an early champion of these concerns. The Foundation-supported public interest law firm arose out of all these

experiences, and its development was encouraged by a United States Court of Appeals decision that affirmed the need for representation of the noncommercial interests of large groups of citizens in the proceedings of regulatory agencies.*

In 1970, when the Foundation began to talk with young lawyers interested in setting up public interest law firms, it acted in accord with its program interests in several areas: environment, minorities, communications, electoral issues, and education. The Foundation also viewed public interest law as an instrument for improving the process of government and as a new way of extending legal representation.

The subject areas in which public interest law firms became engaged had long been recognized as appropriate for philanthropic investment, and subsidy of the practice of law for social purposes had been common in poverty and civil rights law. But something new had emerged: the use of charitable funds to support firms litigating on behalf of persons and groups who represented broad interests but might not be poor or deprived. The Internal Revenue Service saw this activity as significantly different from earlier practice, and in October, 1970, it suspended the issuance of tax-exempt rulings to public interest law firms.

Eventually, the IRS challenge was found wanting and dropped. But a question was raised by implication: Does representation by public interest law firms really serve the public interest? The question disturbed many, even among those friendliest to the aims of the new institution. Eventually, the body of law and experience being developed in public interest actions may answer it definitively. In the meantime, a few observations may be noted:

1. For the most part, public interest law represents the rights of large numbers, many of them poor or members of minority groups. Yet the legitimacy of the litigation does not depend on the numbers benefited, or the economic or ethnic status of the clients. Rather, it is the nature of the right or the interest at issue that justifies action by a public interest law firm.

2. Although public interest law is concerned with both public and private decision making, experience so far reveals a concentration on government and on reforming public procedures. One result has

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United Church of Christ v. *Federal Communications Commission*, 359F. 2d 944 (D.C. Cir. 1966).

been a positive reception by government of many public interest law efforts. Some government agencies now seek out the counsel and cooperation of public interest lawyers.

3. Public interest lawyers are also contributing to public consciousness of inequities or shortcomings in the society. In this sense, the public interest lawyer's purpose transcends process (representation of the unrepresented or underrepresented) and involves substantive concerns with issues of social policy. Further, each firm tends to specialize in particular areas, such as equality of opportunity in employment, education, and health; environmental protection; government responsiveness to the public, especially to neglected groups; the fairness of business practices, and the safety of commercial products.

12

The Record

Ford Foundation Relations With Public Interest Law Firms

Once the Foundation established its commitment to public interest law as a promising new instrument to serve important social objectives, careful ground rules were adopted to guide relations with the firms it intended to support. The first was to look not only for talent and energy among the staff lawyers, but also for experience and standing at the bar among the firm's advisors and trustees. The second was that the Foundation would in no way be engaged in selecting, or rejecting, any particular lawsuit or administrative matter a firm might pursue.

In order to provide sustained counsel to the whole public interest law program, an advisory committee was established. It consisted of William Gossett, Bernard Segal, Whitney North Seymour, Sr., and Orison Marden,* all past presidents of the American Bar Association. The committee reviews and advises on all Foundation grants in public interest law.

It was recognized early that public interest law firms and their activities would probably be controversial and sometimes cause anger, since they are in the business of challenging the policies and practices of well-established institutions and powerful interests. Although there can be no absolute safeguards against unwise actions by a grantee firm, nor any way to immunize it against attack, the requirements established by the Foundation are designed to give the firms the best

*Deceased August, 1975.

possible advice. For example, each firm has a litigation committee, composed of lawyer members of its board of trustees, to which staff attorneys are required to submit plans for all legal action for approval. Most of the litigation committee members come from the community in which the firm is located and have litigation experience or specialized knowledge in the firm's particular fields of interest. In addition, *each firm's* board of trustees stays in close touch with the Foundation's declared policies on public interest law.

Record of Performance

The first two firms to which the Foundation made grants in 1970 were the Natural Resources Defense Council, wholly concerned with environmental problems, and the Center for Law and Social Policy, which concentrates on the environment, consumer affairs, and health problems of the poor. By 1975, grants had also been made to thirteen other firms:*

Center for Law in the Public Interest
Citizens Communications Center
Education Law Center
Environmental Defense Fund
Institute for Public Interest Representation
International Project
League of Women Voters Education Fund
Legal Action Center
Public Advocates
Sierra Club Legal Defense Fund
Women's Law Fund
Women's Rights Project
Research Center for the Defense of Public Interests (Bogotá, Colombia)

By 1975, about 300 cases were in litigation. Some seventy others

*See Appendix, page 50, for additional information on these firms. Two grants that are an outgrowth of the public interest law program should also be noted. One, to the Public Interest Economics Foundation, will provide economic analysis and counsel to public interest law firms and citizen groups; the other, to the National Association of Accountants for the Public Interest, will provide accounting counsel for a similar clientele. Both actions reflect a concern that the policy-making process become more informed, open, and fair. They grow out of the recognition that as public interest law issues have become increasingly complex and technical, informed citizen groups need better expertise to present their views adequately.

14

had been closed out, having been won, lost, mooted, or withdrawn.* The firms had intervened or were intervening in nearly 150 administrative proceedings, mostly hearings before federal or state regulatory commissions. Other activities more difficult to tabulate filled approximately one-quarter of the combined dockets and presumably took at least that large a percentage of attorneys' time. These included participation in administrative rule making, advisories to government agencies, research and publications, monitoring regulatory agencies, preparing petitions, and conducting negotiations. Both the variety of these nonlitigative activities and the time allocated to them attest to their special importance for public interest practice.

Firms have varied workloads, especially with respect to litigation. Lawsuits constitute only about one-third of the docket of the Institute for Public Interest Representation but two-thirds or more of the dockets of the Environmental Defense Fund, the Center for Law in the Public Interest, and the Sierra Club Legal Defense Fund. Two specialized firms, International Project and the Citizens Communications Center, focus on work with regulatory agencies more than on litigation. The dockets of Public Advocates and the Center for Law and Social Policy are about evenly divided between litigation and other activities. The Women's Law Fund concentrates on regional litigation.

These differences derive from the firms' backgrounds, interests, and operating styles.

The Environmental Defense Fund (EDF), heavily committed to litigation, is following its early inclination: It began as an instrument of a group of scientists anxious to halt the indiscriminate use of DDT and other long-lasting pesticides. It was virtually launched in a courtroom to test whether litigation could accomplish what persuasion had not. EDF continues to regard legal action as a most useful way to check what the scientists on its board regard as environmentally and socially destructive actions. But EDF has not been content merely to oppose what it thinks ill-advised. It has also offered possible alternatives, as it did when opposing a proposal for a Tocks Island reservoir on the Delaware River (now abandoned), and EDF's program on water quality resulted from effective consultation with the government.

The Center for Law in the Public Interest began with a docket

*This is an approximation; exact figures are indeterminable because of joint suits. The total includes *amicus curiae* interventions.

composed almost entirely of challenges to the use of land and resources in the Los Angeles area. In a short time, the firm completed an unusually large number of cases and won most of them. It has now broadened its agenda and is working in the fields of fair employment, corporate responsibility, and electoral reform. In the corporate responsibility area, two cases (Northrop and Phillips Petroleum) have been settled, with important results for the concept of independent "outsider" participation in the management of these organizations.

The Sierra Club Legal Defense Fund was created to supervise lawsuits in which the Sierra Club was a litigant. (It is modeled after the NAACP's "Inc. Fund.") The central office has a comparatively small number of cases, but it supervises and lends technical support to a nationwide network of Sierra Club lawyers.

Citizens Communications Center engages in a variety of activities. Most of its time is spent representing the interests of citizen groups before the Federal Communications Commission. As far as possible it seeks to negotiate agreements between complainants and broadcasters and participates in rule-making and policy-making conferences with federal agencies.

The International Project, operating from a slim body of law, has concentrated on helping citizen groups to communicate and work with government agencies and advisory boards concerned with international matters, and to become involved in international meetings, such as the 1974 Law of the Sea Conference.

The Institute for Public Interest Representation, based at the Georgetown University Law Center, devotes much of its time to research and publication. It has a strong interest in administrative proceedings, petitions, monitoring, and other techniques aimed at improving government performance by critical review of official procedures.

The newer firms are still developing distinctive styles, but it appears that the Education Law Center and the Women's Rights Project will concentrate on litigation and agency monitoring. The Legal Action Center, on the other hand, will use a variety of educational and informational techniques, in addition to litigation, to persuade public and private employers to hire ex-offenders and addicts.

The Research Center for the Defense of Public Interests in Bogotá, Colombia, represents the first attempt to test the adaptation of the concept of public interest law in a developing country. Set up by several Colombian attorneys, the center has a well-known and diver-

sified board and has matching support from the Inter-American Foundation.

Although much of the publicity generated by public interest law has focused on environmental and consumer activities, a great deal of its work is done on behalf of minorities, low-income people, and others who suffer deprivation of one sort or another. Among the client groups and organizations that have been represented are women, juvenile offenders, the physically and mentally handicapped, children, and low-income tenants. And, in addition to environmental and consumer protection, the main areas of public interest law activity are reform of governmental processes, fair employment, the mass media, physical and mental health, women's rights, electoral rights, international issues, and education.

The following brief accounts of public interest law activities, organized according to subject matter, convey a sense of the versatility and scope of the organizations supported by the Foundation. They represent a considerable part—but by no means all—of what is being done in the public interest law field.

Environmental and Consumer Protection. The recent proliferation of litigation on behalf of the consumer and in defense of the environment arises out of a perception that our system has not shown the necessary regard for health and aesthetically related values such as the quality of air, land, and water, and the safety of consumer goods.

Dozens of legal actions have been taken in the past five years to enforce provisions of the National Environmental Policy Act (NEPA) and similar state statutes. Much of the litigation has been concerned with who must file statements and the contents of those statements. A high percentage of these actions has succeeded in defining and enforcing the legislated procedure. As a result, many government agencies are now taking the impact statement requirements of NEPA more seriously than previously.

Public interest lawyers have also sought to enforce the substantive provisions of other protective legislation, such as statutes protecting the national forests against excessive tree cutting, and the pure water and clean air laws. They have also begun to explore questions dealing with occupational health and safety. A long and generally successful campaign has been waged in the courts, in administrative hearings, and by negotiation with regulatory agencies to ban certain pesticides with broad, indiscriminate, and long-lasting power to harm. The

Natural Resources Defense Council, which has become exceptionally well informed on nuclear power, is active in several lawsuits that attempt to focus on issues relating to the disposal of highly toxic radioactive waste.

Private land-use development is also being subjected to environmental and other types of governmental control. In California, as a result of public interest law litigation, land developers must comply with state environmental statutes, and local zoning practices must conform to comprehensive, long-range planning. The Center for Law in the Public Interest has been most active in this area and has recently brought a case on behalf of people who work in Irving, California, but cannot live there because of restrictive zoning laws, which they contend violate the county's general growth plan.

Environmental litigation raises profound issues for public interest law. The cases and the interests at stake are complex. In most of the difficult cases, it is not self-evident what public policy should be. Nevertheless, the record for the last five years indicates that public interest law litigation in this field has touched a responsive chord among substantial segments of the public. That these efforts coincide with the concerns of large numbers of the American people appears to be borne out by the continuing strong support, including dues-paying memberships, for the major environmental organizations. In their impact on environmental policy, public interest law firms have developed a role for the public in the nation's decision-making process that could not easily have been forecast in 1970.

In the consumer field, the focus has been on challenges to practices that impair the quality of retail goods or that tend to fix the prices of basic products without reference to consumer interests. One example is the legal questioning of restrictions on the import of tomatoes, textiles, steel, and oil. Discriminatory credit and pricing have also been under attack. Suits to compel credit card companies to allow merchants to give discounts to cash customers have been mooted by legislation granting that relief. Public interest lawyers continue efforts to get credit extended on an equal basis to women and to racial and ethnic minorities. Suits challenging the traditional rate structures of utilities, which now favor large users, have significance both for consumers and for the environment, since a suggested substitute system of pricing would discourage waste and reduce demand.

Efforts have also been made to support the enforcement powers of federal agencies. In an important administrative decision, the Federal

Trade Commission now requires advertisers to substantiate scientific claims with scientific evidence. A case raising the issue of correcting misleading advertising was lost on appeal but in such a way that the issue can be resurrected. The Fairness Doctrine has been used for alternative advertising in both environmental and consumer matters. Action has also been taken to apply the provisions of the Administrative Procedures Act requiring notice and opportunity to comment to Federal Reserve Board regulations dealing with reserve requirements of its member banks. This is of concern to consumers, investors, and mortgagees.

As with environmental concerns, consumer protection efforts continue to enjoy wide support. Specialized consumer agencies at all levels of government have been established, and there are good prospects that the consumer movement will be reinforced by additional institutions.

Reforming the Governmental Process. To help make government more responsive to wider segments of the community, much of the effort of the Ford Foundation-supported firms has been directed at opening administrative processes to public scrutiny, enabling the public to participate in agency decision making, and improving internal procedures of governmental bodies.

Freedom of Information suits have proved to be a sharp wedge in opening governmental agencies to public scrutiny and actions have been filed against a number of them, including the Federal Reserve System, the Federal Highway Administration, and the Department of Commerce. As a result, the courts have limited the scope of exemptions and the Act in several instances; for example, businesses can no longer resist disclosure with a blanket claim of "confidential" information, and audits of the Law Enforcement Assistance Administration are now available.

A principal method of public participation in administrative decision making has been the use of comments in rule making. Public interest law firms have committed a great deal of time and effort to this activity. As a result of their work and others' and of an important circuit court decision specifying the Federal Communications Commission's duty to seek out listener viewpoints, several federal agencies have now taken steps to broaden citizen participation in agency proceedings. The agencies have come to recognize that it is not enough to sit back and wait for the interests to clash; rather, an active effort

must be made to get interested groups involved in hearings. The FCC now sends special mailings to groups interested in policy development. The Consumer Product Safety Commission has developed a program under which consumer groups can submit plans to develop safety standards for particular products and receive financial assistance for their work. The Federal Trade Commission has created a panel of consumer and industry representatives to work out a proposal on children's advertising. And the Interstate Commerce Commission has gone even further by creating an Office of Public Counsel to assist consumers, principally farmers and passengers, at public hearings.

Another means of broadening citizen participation has been through the use of advisory committees to governmental agencies. As a result of pressure, agencies have opened membership to unrepresented groups and created additional advisory committees to help the newcomers. A lawsuit, filed under the Advisory Committee Act of 1973, enabled a women's group to gain access to a Defense Department Advisory Committee that deals with women in the armed forces. Dockets of public interest law firms list many other, less formal modes of participation, from preparing reports to consultations.

Efforts to reform internal procedures range from lawsuits to informal pressure. These activities have helped develop new ways of dealing with prisoners and juveniles. In addition, procedures have been devised to minimize adversary situations; for example, the FCC has been persuaded to initiate a rule-making procedure that, under certain conditions, can avoid a license challenge, and the Food and Drug Administration, under a recent Supreme Court decision, has streamlined the way in which it determines the safety and efficacy of drugs.

Standing has been expanded in a variety of contexts and forums. Not too many years ago, it would have been unusual for people without a direct economic interest to participate in administrative matters. Now there is a growing number of instances in which public interest law and governmental agencies have worked out cooperative arrangements. Today, the doors are open in many agencies, and the problem of access is rarely one of law but of the scarce resources of citizens groups.

Fair Employment. Work in this area has concentrated on racial and sexual discrimination in public agencies (notably police and fire departments) and in private business (such as banks, insurance com-

panies, retail stores). Suits have sought affirmative plans to ensure future equal treatment of minorities and women. The firms have also challenged discriminatory practices such as denial of leave and medical benefits for pregnant women and employment tests that in effect screen out minorities.

The approaches of the law firms vary. Public Advocates, for example, tries to enlist the support and cooperation of state and federal enforcement agencies not only to bring pressure on public or private groups practicing discrimination, but also to use the resources of the enforcement agencies to conduct investigations and make reports. When public agencies have been willing to do this, the cooperative arrangement has worked well. If the enforcement agencies are reluctant to proceed, or seem to enter into "sweetheart" agreements, the law firm will litigate.

Public Advocates has been able to negotiate industrywide agreements in banking, in the savings and loan industry, and in several utilities in California. It has been important both to the law firm and to the industry concerned to work with a broad coalition of minority-group organizations. In that way mutually satisfactory agreement goes far to assure the industry of the support of those organizations, and the law firm is spared the task of relitigating cases against individual employers.

Some of the most innovative work in combating employment discrimination is being done by the Legal Action Center on behalf of persons with criminal or drug abuse histories. An action against the New York City Transit Authority has established the principle that a public employer cannot exclude persons from employment solely on the basis of their past addiction or current participation in a methadone maintenance program. And the U. S. Postal Service has introduced new regulations providing for the hiring of former addicts, and current participants in methadone maintenance programs, in accordance with specific job-related selection criteria.

The Legal Action Center has developed adjustment and counseling procedures and a wide network of consultation services for agencies serving ex-addicts. Further, the center's close ties with the Vera Institute of Justice provide it with an unusual ability to monitor these actions.

The work of the Citizens Communications Center, described in the next section, bridges the communications and employment fields. In its negotiated settlements to ensure greater responsiveness to minori-

ties in broadcast programming, the center has been able in many cases to include provision for affirmative action training and employment.

Responsiveness of the Mass Media. A major concern of Foundation-supported firms active in communications has been to give audiences a voice in determining the kinds of programs they are to see and hear and to facilitate minority access to cable television. The firms have also challenged the concentration of control of broadcasting stations and newspapers and argued that where advertising promotes a misleading view, other views should be given a hearing.

One of the most important cases to date was the petition to deny a license renewal filed by the Citizens Communications Center against the Alabama Educational Television Commission. On the basis of the center's arguments, the FCC held that the station had been guilty of discrimination against blacks in programming and hiring. The decision established the proposition that automatic renewal can no longer be presumed, and that if bona fide challenges are made, stations must demonstrate that their performance is in accord with the law. It incorporated many of the judicial precedents developed under civil rights, voting rights, and employment discrimination cases, the most important of which is that quantitative results, rather than proof of intent, are sufficient evidence of discrimination. In addition, the FCC held that public broadcasters have even greater obligations to minorities than do commercial broadcasters.

The Alabama case was the culmination of a sustained effort by the center over a considerable period to institutionalize challenges to license renewals as an effective legal tool. Nor have petitions been restricted to matters of discrimination; they have also challenged stations on the grounds of mislogging programs, changes in format, and concentration of control. By now, it has become a practice for many broadcasters to negotiate with citizens groups on a variety of issues rather than face the prospect of FCC action. Recently, in such pre-renewal discussions, at least ten agreements were reached in the New York-New Jersey area. This trend has become so pronounced, however, that the FCC recently told broadcasters that they cannot negotiate away their obligations under the law by sharing certain responsibilities with citizens groups.

Issues relating to the Fairness Doctrine are being dealt with increasingly through negotiations or by actions that have broader implications than the case-by-case approach. The Citizens Communications

Center has come forward with a proposal that would allow broadcast journalists to present controversial issues without regard to balance, but would also offer individuals or groups "access message time" (one-minute spots in prime time) to respond. This system is now being tried on an experimental basis in San Francisco and Pittsburgh, and it has been welcomed as a creative alternative.

On the whole, the FCC has probably become more responsive to citizen access than any other major government agency. And the center's work has resulted in an increase in the means available to community groups to assess station performance and responsiveness.

Health and Mental Health. Public interest lawyers have concentrated on improving standards of medical care for those least able to articulate their needs, especially the poor and minorities. A series of lawsuits to compel hospitals to offer a minimum amount of free service, as specified in the Hill-Burton Act subsidies, resulted in regulations by the Department of Health, Education and Welfare that define the service obligations of the hospitals including a requirement to serve Medicaid patients. Related efforts have been made to force public hospitals to maintain standards equal to those of nearby private institutions. The Supreme Court has recently heard a case involving the obligation of hospitals to provide at least some free service to indigents as a condition of maintaining a charitable tax status.

In addition, special concern has developed for the handicapped. A successful suit secured ramps for the physically handicapped in the new Washington, D.C., subway. Other litigation seeks to establish the right of physically or mentally handicapped children to equal public education.

Care for the mentally ill has become another major concern. Current suits argue for the right of the mentally ill to appropriate care and the consequent responsibility of the state to insure that a person who is civilly committed receives therapy and is not just locked up for safekeeping, a principle given strong support by a recent Supreme Court decision. Specific issues have been raised on the "convenience" use of tranquilizers, patient labor without pay, safeguards for human subjects of medical experiments, and definitions of informed consent. The actions brought by public interest law firms have called attention to needed reforms that may require systematic oversight of health institutions.

Women's Rights. Lawyers especially concerned with the rights of women have focused on discrimination in education and employment, on health issues, insurance coverage, and related benefits. Firms are also working on day-care licensing regulations that adversely affect the poor and on sex discriminatory practices in commercial and mortgage lending.

In matters related to women's health, public interest law activities have sought stricter regulation of potentially carcinogenic contraceptive drugs, of human experimentation, and of the use of drugs for nonapproved purposes. They have argued for monitoring procedures of intrauterine devices and for warning labels on prescription drugs that may be especially harmful to pregnant women.

The issues in insurance and disability largely center on the exclusion of pregnancy-related disabilities from sickness and accident plans. The Supreme Court held that state plan exclusions are not unconstitutional, but there are a number of cases challenging plans under antidiscrimination statutes. In an important case brought by the Women's Law Fund, the Supreme Court invalidated the mandatory maternity leave policy of the Cleveland Board of Education as arbitrary under the due process clause of the Fourteenth Amendment. In another pregnancy-employment case, it was held that failure to provide sickness and disability leave to a woman temporarily unable to work after childbirth violated Title VII of the Civil Rights Act when the collective bargaining agreement provided for sickness and disability leave, but not maternity leave. Several other cases challenge sex discrimination by employers in promotion, fringe benefits, reinstatement after maternity leaves, and layoff policies.

A number of actions involve discrimination against women in police and fire departments. Cleveland has now eliminated its quota restricting the number of women police officers. A federal appeals court invalidated police weight but not height requirements that had eliminated 99 per cent of all women: the height issue is pending decision on a petition for *certiorari* before the Supreme Court.

In education, several cases involve discrimination in curriculum, vocational education, and athletics; equal resource allocations to female students and their activities; and the elimination of sex discrimination in textbooks. A recent case, on behalf of the Women's Equity Action League and others, seeks affirmative action by HEW and the Department of Labor in enforcing the antidiscrimination provisions of education and health-training programs.

International Issues. The International Project was established to extend public interest law activities to the processes of foreign-policy formulation and international decision making, particularly when these impinge on consumer, environmental, and social concerns. The major consumer cases have centered on import restraints on steel, textiles, tomatoes, and meat. The firm's efforts have been directed both at assisting consumers in presenting their positions to government and at opening the decision-making process. As a result, the government's textile advisory committee and other aspects of the decision-making process on textile imports have been opened to the public, and the Department of Agriculture has agreed not to discriminate against imported tomatoes and to consider price and quality factors.

In the environmental area, a sustained effort has been made to extend NEPA's reach to activities of U.S. agencies that have international significance, for example, on marine pollution problems. Work is also being done to bring environmental considerations to bear on the U.S. nuclear export program as well as the overseas pesticide program of AID.

An issue that has consumed considerable time and staff resources centers on oil transportation—the design, location, and construction of port facilities, international and national rules for construction and design of oil tankers, liability for oil discharges at sea, and the drilling of offshore oil. Another effort deals with issues that arose in the Law of the Sea Conference. International Project lawyers have participated on the Secretary of State's Advisory Committees and as members of the U.S. delegation to the Laws of the Sea Conferences, and they have also been collaborating with environmental groups in other countries.

The project has, with State Department support, arranged for environmental organizations, such as Friends of the Earth International, to be accredited before international agencies that deal with environmental matters.

Despite heavy demands of consumer and environmental issues on this small firm, the International Project is also beginning to explore the protection of human rights. A suit, brought on behalf of the Southwest African Peoples Organization, the American Committee on Africa and others, is challenging the Department of Commerce's dealings with South Africa on imports from Namibia (Southwest Africa). The plaintiffs allege that these negotiations violate the United States' obligations under the U.N. Charter and the Security Council

resolution forbidding such dealings with South Africa because of its illegal presence in Namibia.

With respect to citizen access in general, the project has played a leading role in persuading the State Department to adopt rule-making procedures, regulations requiring public participation in international negotiations, and environmental regulations involving public comment.

Education. In California, Public Advocates won an extended trial in the *Serrano* litigation, which demonstrated that there was a nexus between unequal school financing and deficient educational programs. The case, which was on remand from the California Supreme Court, involves the reallocation of a minimum of $850 million annually to poorer school districts. The trial court produced a lengthy opinion that is now being widely circulated by the law firm in response to requests from various groups throughout the country.

In both California and New Jersey, law firms are helping in the development of educational policy. The firms' contributions consist of advice, testimony, the preparation of explanatory material, and the general defense of rights that have been established in the courts. In New Jersey, the State Supreme Court ordered state agencies not only to change school financing patterns, but also to establish and enforce standards of effectiveness in educational outcomes. The Education Law Center has participated in efforts to implement the court's decision, particularly the examination of educational finance alternatives. In response to specific requests, it has provided legal memoranda and other forms of technical assistance to the legislature, the Governor, and state agencies. So far, the New Jersey Supreme Court has given the legislature until March 15, 1976, to provide additional funds to meet the constitutional mandate.

Judicial recognition that children have an enforceable state constitutional right to a qualitative standard of education has important implications for educational policy throughout the nation. All told, thirty-eight states have constitutional language identical or comparable to New Jersey's. Since the U.S. Supreme Court held in *Rodriguez* that unequal school financing is not a violation of the U.S. Constitution, the New Jersey and California experiences are expected to have increasing effect on equity cases in other states.

In addition to efforts in school finance, public interest law firms have been working to ensure support for special educational needs—for the handicapped, the retarded, and those who do not speak Eng-

lish as their native tongue. And work is being done to rid textbooks and curricula of racial stereotyping. Law firms are also involved in extending due process protection to students, such as the development of standards for suspensions and expulsions, access to records, the expunging of certain kinds of information from records, and the regulation of behavior modification techniques.

Electoral Rights. Public interest groups such as the Litigation Department of the League of Women Voters Education Fund have focused on activities to ensure full citizen participation in government through the electoral process. A number of actions have been aimed at removing administrative obstacles that effectively disenfranchise persons who are otherwise qualified to vote—for example, state and local residency requirements, restrictive absentee voting regulations, and failure to supply adequate and convenient registration sites.

Suits have been undertaken to enforce the principle of one-person, one-vote at all levels of government to make equal representation a reality. Other matters have challenged the use of multimember districts and other election schemes that have the effect of diluting the voting strength of minorities.

A key factor in the area of electoral rights is the dispersion of governmental authority among various state and local units of government. State and local discretion in the regulation of the franchise complicates monitoring of compliance by national groups. For example, after the Supreme Court's decision dealing with the durational residency requirements, a monitoring and enforcement program in twenty states had to be instituted by the League of Women Voters Education Fund to obtain compliance. This effort is part of the local league litigation program for which the national organization provides technical assistance. To date, some 170 local and state leagues have initiated lawsuits in voting rights as well as in areas of "League concern," such as women's rights, school issues, and the environment, housing, and land use.

27

Concerns About Public Interest Law

Four major questions have been raised regarding public interest law activity: (1) Are the courts the appropriate forum to resolve the kinds of issues with which public interest law is concerned? (2) Is public interest law activity overburdening the judicial system? (3) Do public interest law activities at times champion one "public interest" that clashes with another public interest, thus benefiting one segment of the public at another's expense? (4) Are there substantial interests in the community that are not being represented by public interest law firms?

An Appropriate Forum?

Cases that involve broad public-policy issues or deal with large complex and technical matters have frequently led people to raise questions about the proper role of the courts. Although public interest law has sharpened the focus somewhat, the issue is an old one. From the earliest days, courts have been called upon to interpret the Constitution, to adjudicate conflicts between government agencies, and to determine whether such agencies have carried out their responsibilities to weigh carefully competing values and interests. Public interest law operates within this established system, which is open to all citizens. What is new is that it introduces additional issues into the process and gives underrepresented groups a realistic opportunity, backed by adequate intellectual and financial powers, to be heard.

A contention of those who are skeptical of assigning too much policy-making responsibility to the courts is that such questions are more appropriately settled in the political arena, because legislatures

and elected executives are more directly exposed to different interests. Also, it is argued, they have more and wider channels to the public and its representatives than the courts, which can only set forth policy or estop action, whereas the legislature, with the power of the purse, must implement it.

There is no clear-cut answer to these arguments. The legislative process, too, has its drawbacks, and the tug between the two branches is likely to continue. However, it is important to note that courts act at the behest of claimants and never on their own. Claimants, whether represented by public interest law firms or not, are in court only if they allege a legal basis for their actions, statutory or constitutional, and legislatures can alter that basis within constitutional doctrine. Most importantly, courts are usually careful and thoughtful, and there is a sound historical basis for confidence in the ability of the judiciary to handle the matters that come before it in a responsible manner.

In many of the areas where public interest law functions, there are no sure guides to measure competing values or decide with certainty which alternatives should be selected. Furthermore, it is in the nature of the judicial process to sort out and help define complex issues in a public forum. In so doing, it assists implementing agencies to fulfill their functions and enables different groups representing conflicting demands to test them in an adversary proceeding. Particularly at a time when large majorities of the public are intensely concerned with major problems, such as the energy crisis and the economic recession, some groups with special concerns believe that a court is the only place where they can get an adequate hearing.

To be sure, procedural due process is not an absolute. There are often better ways than a lawsuit to resolve some issues. New approaches to conflict avoidance and resolution are proper subjects of inquiry in this context, and are discussed in the last part of the paper.

Pressure on Court Calendars?

The question whether public interest law activity overburdens the courts is somewhat less fundamental, even though some observers have strong opinions about it. Some public interest law cases are complicated and difficult and would indeed take a lot of time, but few of these have reached the trial stage, where most of the court time is consumed. Many of the cases are resolved on the law issues. More-

29

over, public interest lawyers realize that, with few exceptions, they have neither the funds nor the resources to take cases that involve lengthy trials. A review of court dockets—federal and state—shows that the number of court cases brought by public interest law firms is relatively small. In fact, about half of the filings by public interest law firms are in the administrative process and rarely get to the courts.

The Foundation's procedures for selecting firms for funding and the way in which the firms operate help ensure that only substantial claims are brought and that the judicial system is not abused. The record is good; not a single case brought by a Foundation-supported firm has been dismissed as being frivolous; nor has there been any substantial charge of harassment or abuse of process.

Finally, the experience of the past five years shows a steady trend away from litigation and to negotiation and other nonlitigating approaches. The heavy participation of public interest law firms in rulemaking illustrates this point.

Competing Public Interests

The dilemma of competing public interests is the most difficult one for public interest lawyers. It is easier to deal with in those cases that require more open procedures, or seek to expand public access and information and secure legal rights and benefits. Thus, hospital care for the indigent, equal educational opportunities for the disabled, honest and informative advertising and labeling, a proper census count for Mexican Americans, and the treatment of pregnancy-related disabilities under health plans are objectives on which a broad public consensus can probably be found and for which the economic costs of conforming to the law are likely to be accepted.

The difficult cases are:

1. Those in which courts enjoin large economic enterprises or impose such onerous conditions on them that the enterprises might be abandoned, with potentially harmful consequences for economic development and employment. In the energy field, for example, there are cases in which ecological issues clash with substantial claims for economic growth and residential needs. Other examples are the enjoining of construction of an interstate highway system because of its environmental impact and its potential for housing displacement, or applying nationally the nondegradation principle in the Clean Air Act.

30

2. Those that deal with broad public-policy issues and impose large costs; for example, educational finance cases and reform of mental hospital procedures.

Often these are not contests between "good guys and bad guys," nor between private profit and public welfare. There are public needs and good arguments on both sides. In this sensitive area, the structure and the procedures that have been established—the Foundation's advisory committee as well as the boards and litigation committees of each firm—play an important counseling role.

Experience so far indicates that most of these cases get to court either because there are no effective alternatives to resolve the conflicts or because government or industry is not conforming to the law. As of now, the trade-offs in these complex matters cannot be measured quantitatively. It is hoped that a Foundation-commissioned study by the University of Wisconsin on the social and economic consequences of public interest law activity will yield methods for reliable and objective assessments of such costs and benefits.

For now the answer to the question must rest on two points. The proper function of public interest lawyers is to represent significant views that otherwise would go unrepresented in cases affecting the public welfare. The fact that some public desires are incompatible with others requires a court to be careful and puts a heavy responsibility of choice on public interest lawyers. It is their task to choose cases in which the issues are substantial and to litigate only when means short of litigation will not settle these issues. At the same time, they have to be sensitive to other social interests that may be unrepresented in the proceedings and guard against overzealousness.

And secondly, the political and social cost of leaving substantial interests without a representational voice in deciding their own lot is greater than the risk of letting them be heard. It is a principle rooted in the American tradition.

Adequate Representation

Are there substantial interests in the community that do not get adequately represented because of the way in which public interest law firms tend to choose their clientele? No doubt this is the case. Public interest law is still in its early stages, nurtured primarily by a thin flow of foundation funds; legal resources cannot yet be stretched to give everyone the necessary representation. Foundation support

31

has been able to provide a small number of models that, it is hoped, will lay the basis for a more complete institutionalization.

The fact remains, however, that public interest law firms, most of the time, represent established and well-informed groups or organizations; the environmental and consumer cases are the best examples of this. Furthermore, there must be an aggrieved client, and while the rules of standing may be liberalized, the requirement of standing remains crucial. The lawyers themselves have a professional interest in assuring that their clients are responsible in order to assure the courts, administrative agencies, and the public, that the interest they represent is substantial and important. In fact, the broader the interests of the group represented and the more numerous the plaintiffs, the more public interest lawyers are assured that they are representing an interest that should be heard.

Finally, in addition to the safeguards already discussed, the Internal Revenue Service guidelines on public interest law require the firms to file an annual report on the cases handled, including an explanation of the public interest involved in each case.

The Future

This review has discussed beginnings—the demonstration of potential. To move toward its fulfillment, public interest law needs more time and greater effort. The firms now heavily dependent on foundation support cannot remain so if for no other reason than that most foundations are reluctant to tie up their resources in long-term commitments. Moreover, the firms need to do better than just hang on; they need a chance to grow. And they can grow only if they can earn their way from the people they seek to serve.

The concluding section of this report looks at the future of public interest law over the next few years—probable sources of support and efforts to tap and develop them, as well as possible new forms of dealing with social and economic problems and inequities that may emerge from present experience and practice.

Needs and Sources of Support

Fees. When the Internal Revenue Service dropped its 1970 challenge to public interest law firms, it made it a condition of their charitable status that they could not accept fees for professional work. As a result of a considerable effort by public interest law supporters, the Service recently changed that policy and decided that a public interest law firm can accept fees without jeopardizing its tax status. The ruling is qualified, however: The fee must be court- or agency-awarded or approved, and no more than half the firm's annual total costs (averaged over five years) can be defrayed from such fees. "This ruling," the IRS states, "is issued with the understanding that neither the expectation nor the possibility, however remote, of an award of

33

fees will become a substantial motivating factor in [the] selection of cases."

Some public interest lawyers consider the ruling restrictive, but it opens the door to a potential source of support. The general rule in the United States is that each party pays its own attorneys' fees. But under several federal and state statutes, there are exceptions. These statutes include Title VII of the Civil Rights Act (covering employment discrimination), other civil rights statutes, laws relating to clean air and water and to freedom of information, and amendments to the Federal Trade Commission Act. Attorneys' fees can also be collected when there is a "common benefit or fund"—for example, a shareholder's derivative suit. Fees are also sometimes awarded when the defendant has acted in bad faith and it would be unjust to have a plaintiff bear his share of the litigation. The most important exception, however, under which some two dozen federal courts have held that fees were to be awarded is the "private attorney general" theory. This theory holds that a private citizen should be awarded legal fees when the suit brought has effectuated a strong statutory policy that has benefited a large class of people and where such an award is necessary to encourage private enforcement. The theory has also been used in some state courts, most notably in the *Serrano* (school financing) litigation in California, where the trial court awarded $400,000 in counsel fees to Public Advocates.

Recently, however, the Supreme Court, in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, held that federal courts did not have the power to award fees under the "private attorney general" exception. The Court said that recognition of such an exception to the American rule was within the province of Congress. However, the Court affirmed the common benefit or fund exception and the award of fees pursuant to statute. Also, the Court's ruling in the *Pipeline* case is limited to awards of attorneys' fees by courts in the federal system. Although the *Pipeline* case has been a blow to public interest law in its search for supplementary sources of funding, a good deal of follow-up litigation will be required before the case's influence can be more precisely assessed.

Prior to the Supreme Court's *Pipeline* decision, the principle of the private attorney general exception had received support from many sources. For example, Chesterfield Smith, recent past president of the American Bar Association, took a stand favoring reimbursement of the legal expenses of successful plaintiffs in public interest causes.

He saw court-awarded fees not only as equitable in themselves but as a means of enabling the private bar to play a larger role in public interest law activity.

The private attorney general exception also enjoys support among some groups of the organized bar, and an ABA committee is working on a model law relating to the issue. As mentioned earlier, the lower federal courts were nearly unanimous in favor of the exception. Legislation has been introduced in Congress to give discretion to the federal courts to award attorneys' fees in such cases, and a similar bill has been introduced in the California legislature. At this time, it is too early to forecast what the outcome of this legislative activity will be.

So far, public interest law firms have been awarded $1,297,298 in fees. They have received $378,848 of that amount, and the rest, $918,450, is subject to appeals and other unfinished business. However, the IRS ruling is so new that there is insufficient experience to predict the amount of dollars that could eventually flow from this source.

Another possibility of support is for clients who can afford something to pay a reduced fee to public interest lawyers. One of the underlying assumptions of the Foundation's program was that organizations would come to appreciate the effectiveness of legal tools and begin to budget accordingly. Some private attorneys who take public interest clients are being reimbursed by these client organizations. At present, the IRS rule bars tax-exempt public interest law firms from accepting client fees, but the IRS might be persuaded to allow such fees, if the fee scale were below market value and the amounts it yielded fell short of covering the costs of the litigation. Recently, representatives of the Council for Public Interest Law, an organization of firms dedicated to the growth and development of public interest practice, met with the Commissioner of Internal Revenue on this issue and were encouraged to submit a proposed ruling on the subject. The Exempt Organizations Committee of the American Bar Association Section of Taxation has also taken a position in favor of public interest law firms' accepting client fees, within certain guidelines.

Public Subsidy. There is a trend to provide for attorneys' fees through specific statutes. The Court in *Alyeska* expressed its basic support for this kind of assistance:

> It is apparent from our national experience that the encouragement of private action to implement public policy has been viewed as desirable in a variety of circumstances.

Another form of public subsidy is illustrated by the newly created New Jersey Department of the Public Advocate. The director, appointed by the Governor, has cabinet status. The Department has offices of rate counsel, mental health advocacy, inmate grievances, and public interest law. The public interest law office is empowered to institute litigation on behalf of a broad public interest, even against the state, and can intervene in any administrative proceeding. The Department also has an Office of Citizen Complaints and an Office of Dispute Settlement, which provide third-party services to community groups and government. The New Jersey agency is the first of its kind in the country. But there is interest elsewhere. The Wisconsin State Department of Administration has recently commissioned a feasibility study for a similar department.

Other possibilities are a tie-in with the Legal Services Corporation and specific authorizations in agency budgets for citizen input. For example, the Federal Trade Commission has set up a program whereby public interest lawyers can get fees for representation before the agency. The Nuclear Regulatory Agency is looking into a similar arrangement.

Public subsidies pose risks for public interest law. The unique virtue of "private attorneys general" is that they are private and thus immune from the restraints of public employment. If public interest law becomes overly dependent on government subsidies, it may become vulnerable. These matters are difficult to predict. It is not even clear that generalizations can be drawn from the OEO experience. OEO suffered heavy political attack, but government-supported public interest law may not incur this kind of opposition. OEO Legal Services was a pathbreaker. The idea of independent legal representation supported by public money may be gaining acceptance. For one thing, the leadership of the organized legal profession appears to be committed to it.

There remains some uneasiness among lawyers and others that prospects of court-awarded fees might encourage litigation of dubious merit and raise the possibility that defendants will try to induce lawyers to settle cases by offering to pay their fees. These fears do not seem to rest on substantial grounds. Since fees would be offered only

to successful plaintiffs, those with frivolous causes are not likely to seek them. And if they do, courts have ample powers to punish and restrain. It is expected that courts will examine negotiated fees. Neither courts nor legislatures are likely to prove so generous in their awards as to tempt attorneys interested primarily in easy profit, especially since the costs of preparing public interest cases are relatively high. In addition, the tax-exemption of public interest law firms precludes any individual lawyer in a firm from benefiting from court-awarded fees.

Support by the Organized Bar. If public interest practice is to remain and grow, it must be seen as an enlargement of the scope and responsibility of the legal profession. The profession has accepted responsibility for providing public defenders and legal services for the poor. The question is whether that responsibility extends to "publ c rights law." The Special Committee of the American Bar Association has said that it does, and at its 1975 annual meeting in Montreal, the House of Delegates accepted the Committee's recommendation.

Now that the organized bar is committed to the principle, what will happen in practice? The most optimistic estimate is that in about four to five years the ABA will have moved concretely to aid public interest law; the more pessimistic guess is that it will take eight to ten years. No one predicts the bar will move at once, and no one thinks it will not move at all.

When it moves, what can it do? Even though the ABA itself would probably not put up major financial support, it could strongly and probably effectively urge local bar associations to do so. Some bar associations, Beverly Hills, Philadelphia, and Boston, for example, already have made a beginning. Leaders of some large city associations who strongly support public interest law believe it might be possible to institutionalize aid, perhaps through a dues checkoff, that would assure a minimum of continuing support for one or more public interest firms.

The ABA might also support public interest law in nonfinancial but potentially very important ways, such as through help in negotiations with the IRS on fee questions, through the kind of strong and effective backing that it gave the federal legal services program, by support of legislation favoring public interest practice or by opposition to hostile bills. Such actions by the ABA could significantly improve the financial prospects of public interest practice, and, per-

haps more importantly, encourage the bar to accept professional responsibility for it.

The number of firms that could at best be supported by all the sources and methods projected in this paper still falls far short of the number of practicing lawyers required to meet the needs that the work of the past five years has helped to reveal. More firms than there are now are needed, and they should be better distributed geographically. But growth may have to depend more heavily on the extension of the *pro bono publico* practice of conventional firms throughout the country. Here the prospects are unclear; the *pro bono* record of private practitioners is mixed. Most of this kind of work is being done on behalf of individuals and is in the nature of service rather than law reform litigation.

Council for Public Interest Law. The economic options so far discussed are available mainly because public interest lawyers and a few of their supporters have worked to develop them. The further development of these possibilities and the cultivation of public acceptance are complicated and exacting tasks that cannot be effectively performed by a few individuals in their spare time. To this end, an organization was set up at the end of 1974 with funding from the Rockefeller Brothers Fund, the Ford and the Edna McConnell Clark Foundations, and the ABA.

The new council,* which has a full-time executive director, small support staff, and probably three years to complete its work, will begin with a systematic analysis of the economics of public interest practice—an area in which there are now many strongly held impressions and few data. It will then proceed to design possible financing mechanisms, such as drafting model legislation with respect to attorneys' fees as well as legislation to provide direct subsidies. Another project is investigating the feasibility of setting up a large pool of money with independent management and foundation and organized bar support to help finance public interest law activities. The council is also exploring methods by which prepaid legal insurance may be used to finance public interest law, and it is considering professional fund-raising campaigns, the encouragement of research

*Its members include public interest lawyers, other practicing lawyers, and teachers of law.

38

groups, and the use of law school clinical programs. Some pilot experiments will be included in its work: For instance, if a local bar association is interested in public interest law, the council will help design a mechanism to facilitate contributions of local lawyers.

In addition the council will conduct an educational campaign aimed at the legal profession and the general public, serve as an information center, and provide technical assistance to lawyers and others interested in establishing a public interest law practice.

Foundation Support. Five years ago only a few foundations were prepared to support public interest law activity. Today more than thirty participate, most of them small. Among the larger ones, in addition to the Ford Foundation, are Carnegie Corporation, the Rockefeller Brothers Fund, and the Edna McConnell Clark Foundation.

Because of different reporting practices and definitions (litigation/advocacy, public interest law/civil rights), it is difficult to compile accurate figures on the total amounts contributed by all the foundations to public interest law.* However, following this Foundation's definition and that of the IRS, which excludes poverty and civil rights litigation,** the number of public interest law firms supported in part by foundations has grown from three or four in 1970 to over thirty at the end of 1974. Between 1970 and 1974, the total amount contributed by all foundations was about $15 millon; the Ford Foundation's share of that total was close to $10 million. As of September, 1975, the Foundation had contributed more than $12 million to public interest law.

There have been fluctuations in foundation contributions. In 1970 and 1971, the Ford Foundation's contribution to public interest law practice represented more than 90 per cent of the total. By 1973, when several other foundations had become interested in the field, the Foundation's share had dropped to 49 per cent. Then, in 1974, perhaps because of budgetary problems, other foundations sharply

*Statistics included in this section were obtained from initial surveying of the field by the Council for Public Interest Law. With the exception of those related to Ford Foundation activities, they should be regarded as tentative but not unreasonable approximations.

**The Ford Foundation's extensive civil rights program is not included in this report. A general description of Foundation activities in this field may be found in *Current Interests of the Ford Foundation 1976-77*, available on request from the Foundation's Office of Reports.

39

reduced their commitments, and the Foundation's share jumped back up to about 80 per cent of the total. Approximately $9 million has been budgeted by the Foundation for public interest law activity through 1978.

Some Longer-Term Implications

The experience of the last five years is now undergoing formal evaluation by an interdisciplinary group of scholars at the University of Wisconsin. The study, directed by Professor Burton Weisbrod of the Department of Economics, is seeking to place public interest law activities in a broad theoretical and empirical perspective and to find ways to assess the social and economic consequences of the activity. Not limited to the Foundation grantees, the study is taking into account all public interest law activities, including alternative mechanisms. Present plans call for the completion of a comprehensive report in publishable form in September, 1976.

The Wisconsin group has divided its work into two sets of studies. One is a series of examinations of public interest law activities in each of ten fields, such as the environment, consumerism, education finance, employment discrimination, safety and health, and land-use regulation. Each of these area studies will evaluate past activities and attempt to assess the potential for future public interest law efforts.

In addition, the research involves a set of more theoretical investigations, encompassing such matters as the definition of public interest law; how its activities relate to the activities of government, the private for-profit sector, and the private nonprofit sector; and distributional effects—who benefits and who is hurt by public interest law activities.

Even though the formal evaluation research is not completed, it is evident at this stage that quantitative answers in most of these areas are hard to come by. There will be some, but many of the judgments the evaluators will reach will have to be qualitative, yet specific and based on solid scholarly analysis.

The work of the Wisconsin group, as well as discussions with other scholars and policy analysts, has begun to yield possible directions for the further development of legal tools and approaches to the management of disputes. Although the power to litigate and the ability to win are central to the effectiveness of public interest lawyers, some of the issues that engage them cannot be effectively resolved by a

court decision. Some issues should not be dealt with in the courts, some need more expeditious handling than the legal system allows, and some require whole new approaches to conflict avoidance. The Center for Law and Social Policy recently established a project to study some of these questions.

In recent years we have witnessed a veritable cascade of disputes that have come before various kinds of tribunals. Issues range across the entire agenda of government—energy development, environmental protection, consumer protection, education, and so forth. Conflicts over these matters arise among interest groups, between interest groups and government, and between levels of government. Little need be said about the difficulties that the courts, administrative agencies, and other decision-making bodies have in attempting to resolve such large numbers of conflicts efficiently and fairly. The quantitative problem is compounded by the growing complexity, technological sophistication, and interdependence of society's problems.

Against this background, growing numbers of people have doubts about the capacity of government to deal with the problems that it is or will be facing. Agencies with imprecise goals have enormous discretionary authority. Legislatures and chief executives find it increasingly difficult to direct and coordinate the activities of the bureaucracy. Policy directives lose much of their force as they move through the administrative hierarchy, and there is a lack of information about what happens at the field level.

The administrative process is predicated on the settlement of disputes between competing interests. In the regulatory agencies, formal hearings consume large amounts of time and resources. In human service agencies, such as schools, welfare, health, and mental health departments, the clients often are not capable of challenging the bureaucracy. Discretionary decisions have such low visibility that conformity to law is rarely put to the test.

The time is ripe to reexamine the connection between conflict resolution and public administration. Can conflict-resolution processes be made more flexible so that many kinds of problems can be handled more efficiently and equitably? What about the effect of increasing public participation? New structures are needed; different methods of dispute-settling need to be explored and tested.

For agencies dealing with masses of people, the discretion of lower-level officials might be reduced by standardizing administrative procedures. In voting rights legislation and administration this has been

found to be the fair and efficient approach when enforced. One of the key benefits in using goals and timetables in employment discrimination cases is to avoid discretionary case-by-case determinations. When discretion has been replaced by standardization, implementation can be statistically monitored. It is reasonable to expect clear standards and objective eligibility criteria to help reduce conflict.

Another possibility is deregulation. A recent example is the Food and Drug Administration's experiment with food-identity standards. Under its prior approach, all ingredients for many foods had to comply with official standard recipes. It became difficult to establish or change a standard. Hearings were lengthy, complex, and costly. Under the new approach, the FDA is regulating only the essential elements of certain foods and relying on labeling requirements for nonessential elements. The Federal Communications Commission's antimonopoly rules are another example, and there are proposals to deregulate parts of certain industries, for example, trucking and the airlines.

Standardization and deregulation may make it easier to develop better methods of monitoring administrative performance. There are, of course, many administrative systems that cannot be standardized, but much can be done in order to improve methods of control. During the last two decades system-management techniques have developed rapidly and found wide application in public bureaucracies. Much heated debate about the merits of these techniques has been recorded in scholarly and general literature. But problems of accountability and efficiency persist, and all the experience shows that much more remains to be done to improve methods of coordination and control.

Still, no degree of standardization can or should obviate all administrative discretion. To take account of social and individual differences, balances have to be struck between the need for strict administration and flexibility. Many broad problems cannot be solved by standard procedures, and decisions will have to be made on a case-by-case basis. Thus, there will continue to be a need for administrative hearings and conflict-resolution techniques. However, traditional procedures can be redesigned in light of new needs. For example, a recent Supreme Court decision is allowing the FDA to modify its hearing process. Under this decision, drug companies must produce results of scientifically valid experiments before they are granted full evidentiary hearings on challenges to the efficacies of their products. The intent is to reduce lengthy hearings while protecting the public

against ineffective drugs. Although scientific knowledge and other forms of expertise cannot resolve value questions, this kind of information can be used to reduce disagreements over questions of fact. The FDA Supreme Court decision is a concrete step in this direction.

Other techniques now being explored might resolve controversies before full evidentiary hearings become necessary. Public interest law participation in certain kinds of rule making is an example. Access by affected groups to this process should lead to better informed settlements which, in turn, should reduce the need for later confrontations. There is also good reason to explore the applicability of other techniques of conflict resolution. Arbitration and mediation have been used successfully in commercial matters and labor-management relations; to what extent are they applicable to other problems, such as in clashes on environmental or educational issues?

Where does public interest law fit in this wider perspective? No matter what reforms are implemented, institutions performing the role of ombudsmen and private attorneys general will still be necessary. Although mechanisms allowing for citizen participation in government are increasing, there is no reason to think that government is any more likely tomorrow than today to seek out the views of those who are not normally represented among its interlocutors. Thus, there will be a need for institutions to advocate the causes of the unrepresented.

It is probable, therefore, that public interest law activity will play different roles in varied institutional settings. Litigation, used judiciously, will continue to remain of central importance. Negotiation, participation in rule making, and administrative consultations often are more fruitful. Having established their credibility through work of high quality in these areas, public interest lawyers must use their imagination and resourcefulness to find new ways to help society serve people more equitably and effectively. It is likely that the final judgment on public interest law will be based on such innovative performance, rather than simply on a toting up of litigative victories.

Edward H. Levi, in his foreword to *The Public Interest Law Firm: New Voices for New Constituencies*, said that the important question is:

> . . . whether [the] success or failure [of public interest law], however measured, will have effects upon our political system or system of justice through the creation, with staying power, of a new instrument for representation, or through the revitalization or conceivably the weakening of traditional forms . . . .

Appendix

American Bar Association
Special Committee on Public Interest Practice

RECOMMENDATIONS

The Special Committee on Public Interest Practice recommends adoption of the following:

RESOLVED, that it is a basic professional obligation of each lawyer engaged in the practice of law to provide public interest legal services;

FURTHER RESOLVED, that public interest legal service is legal service provided without fee or at a substantially reduced fee, which falls into one or more of the following areas:

1. *Poverty Law:* Legal services in civil and criminal matters of importance to a client who does not have the financial resources to compensate counsel.
2. *Civil Rights Law:* Legal representation involving a right of an individual which society has a special interest in protecting.
3. *Public Rights Law:* Legal representation involving an important right belonging to a significant segment of the public.
4. *Charitable Organization Representation:* Legal service to charitable, religious, civic, governmental and educational institutions in matters in furtherance of their organizational purpose, where the payment of customary legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate.
5. *Administration of Justice:* Activity, whether under bar association auspices, or otherwise, which is designed to increase the availability of legal services, or otherwise improve the administration of justice.

FURTHER RESOLVED, that public interest legal services shall at all times be provided in a manner consistent with the Code of Professional Responsibility and the Code of Judicial Conduct;

FURTHER RESOLVED, that so long as there is a need for public interest legal services, it is incumbent upon the organized bar to assist each lawyer in fulfilling his professional responsibility to provide such services as well as to assist, foster and encourage governmental, charitable and other sources to provide public interest legal services.

FURTHER RESOLVED, that the appropriate officials, committees, or sections of the American Bar Association are instructed to proceed with the development of proposals to carry out the interest and purpose of the foregoing resolutions.

REPORT

This resolution was deferred to the Annual Meeting at the Chicago Midyear Meeting so that it could be discussed with various segments of the organized bar.

Since then it has been reviewed from within the ABA and outside the Association. In February 1975, a Conference of Bar Leaders was held in New York City. Bar associations from Washington, D.C. to Boston were represented by their respective bar leaders; in most cases presidents and presidents-elect. The resolution was found generally acceptable and there was uniform agreement that the organized bar should do more to assist lawyers in fulfilling their public interest legal services obligations. There was no dissent from the proposition that each lawyer had a duty to provide public interest legal services.

As of the writing of this report, several state and local bar associations have adopted a statement of obligation substantially similar to that being proposed for adoption by this Committee. It is the Committee's opinion that these associations are leading associations, and the American Bar Association should also undertake the lead in this vitally important area of the delivery of legal services. The District of Columbia Bar, the Chicago Council of Lawyers, the Beverly Hills Bar Association, the Arizona, Philadelphia and the Boston Bar Associations have passed substantially identical resolutions to that being proposed. The Association of the Bar of the City of New York, the Florida Bar and the Seattle-King County Bar Association presently have the subject matter under active consideration.

The resolution has been reviewed and approved by the ABA Committee on Ethics and Professional Responsibility, and has been referred to all relevant committees and sections of the Association. It has also been favorably acted upon by the Consortium on Legal Services and the Public, which includes the following ABA committees:

a) Standing Committee on Lawyer Referral Service
b) Special Committee on Delivery of Legal Services

c) Standing Committee on Legal Assistance to Servicemen
d) Standing Committee on Legal Aid & Indigent Defendants
e) Special Committee on Prepaid Legal Services
f) Special Committee to Survey Legal Needs

The Young Lawyers Section, the Council for Advancement of Public Interest Law, and the National Legal Aid and Defender Association have also approved the resolution.

In general, the resolution states that it is the lawyer's duty, as a function of his professional status, to provide public interest legal services; legal services without fee or at a substantially reduced fee. The resolution further provides several areas which would qualify for fulfillment of the obligation.

Suggestions received from the Council of Criminal Justice Section have been reflected in the resolution since the Midyear Meeting. The resolution reflects these suggestions and, additionally, those received from bar leaders contacted from within and outside the ABA.

Generally, the pertinent changes to the resolution are:

1) The duty has been expressly stated as deriving (among other things) from the professional status of a lawyer.

2) The application of the resolution is limited to lawyers in the practice of law (e.g., judges would be exempted from some activities because of their status as judges; government lawyers would not necessarily be exempt, unless by definition their work qualified and their compensation was substantially reduced as a result).

3) Areas 1 through 4 have been simplified and shortened and one additional area has been added; that is Area 5, which would cover certain uncompensated work, such as bar association or related activity.

4) The resolution has also imposed an obligation upon the organized bar to foster and encourage governmental and charitable sources to provide public interest legal services and to further encourage and assist each lawyer in fulfilling his obligation.

In our many deliberations since September 1973, the Committee has concluded that the Canons and Ethical Considerations, although not explicitly, make it clear that the legal profession and each individual lawyer share the responsibility for providing public interest representation and that there is a duty on each individual lawyer to provide his share of such public service work.

Of course, behind the development of the resolution is our Committee's further conclusion that lawyers and the organized bar are in need of guidance in determining the areas in which they should become involved in performance of this duty.

The duty of each lawyer and the legal profession is well supported by authorities and in the basic precepts of the profession.

Roscoe Pound stated a profession's true function most succinctly:

> There is much more in a profession than a traditionally dignified calling. The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose.

For this reason, in part, a lawyer's time and energies must be allocated not only according to the demands of the marketplace, but as well to the needs of society for his professional skills. It is the element of public service which distinguishes a profession from a trade, and our profession should impose upon itself the duty of such public service.

The Code of Professional Responsibility supports the resolution and the Ethical Considerations encompass services to the poor, but there is no mention of a professional obligation to provide representation in cases seeking the vindication of an individual's fundamental civil rights, or rights belonging to the public at large, where society needs to have its rights vindicated but as a practical matter the would-be plaintiff or defendant will take action to vindicate or defend those rights only if he receives aid, and does not have to bear the costs himself. (Canons 2; EC2-25; EC2-16; EC8-3)

Ethical Considerations are "aspirational in character." As such, unlike the Disciplinary Rules, they are not enforceable standards, but are "objectives toward which every member of the profession should strive."[1]

Canon 2 provides:

> A lawyer should assist the legal profession in fulfilling its duty to make legal counsel available.

EC2-25 provides:

> The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . . Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need.

See also EC2-16, which states:

> Persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should supply and participate in ethical activities designed to achieve that objective.

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[1]Code of Professional Responsibility, Preamble and Preliminary Statement, p. 1 (1970).

And see EC8-3, which states that:

> Those persons unable to pay for legal service should be provided needed services.

It is clear from the Canons and Ethical Considerations that the legal profession accepts responsibility for providing public interest representation, and that each individual lawyer shares this responsibility, but it is not clear exactly what types of legal services will fulfill the individual lawyer's obligation, or how much he is expected to do. Lack of affirmative guidance as to what each individual lawyer is expected to do has resulted in many lawyers and law firms doing little or nothing. A collective responsibility must be translated into a defined individual duty in order to realistically expect that each lawyer will contribute his share. The profession has not yet done this and our resolution is designed to meet this end. The Committee strongly recommends that the Association take action to cause lawyers to recognize their professional obligation.

Respectfully submitted,

Harry L. Hathaway, Chairman
Edmund J. Burns
Roderick A. Cameron
Frank T. Gray
Charles A. Hobbs
Arnold B. Kanter
Charles J. Parker
William G. Paul
Howard L. Shecter
Marna S. Tucker

August, 1975

Public Interest Law Firms Supported by the Ford Foundation

	Grants as of December 1975
Southern California Center for Law in the Public Interest 10203 Santa Monica Boulevard Los Angeles, California 90067 Frederic P. Sutherland, Executive Director Landon Morris, Chairperson Founded: 1970	$ 734,000
Center for Law and Social Policy 1751 N Street, N.W. Washington, D. C. 20036 Joe Onek, Executive Director Honorable Arthur J. Goldberg, Chairperson Founded: 1969	1,805,000
For Responsive Media: Citizens Communications Center 1914 Sunderland Place, N.W. Washington, D. C. 20036 Frank Lloyd, Executive Director Henry Geller, Chairperson Founded: 1969	870,000
Council for Public Interest Law 1812 N Street, N.W. Washington, D. C. 20036 Charles Halpern, Director Founded: 1975	110,000
Education Law Center, Inc. 605 Broad Street Newark, New Jersey 07102 Paul Tractenberg, Director C. Willard Heckel, Chairperson Founded: 1973	1,125,000
Environmental Defense Fund, Inc. 162 Old Town Road East Setauket, New York 11733 Arlie Schardt, Executive Director Arthur Cooley, Chairperson Founded: 1967	747,000

Georgetown University Law Center 777,079
Institute for Public Interest Representation
600 New Jersey Avenue, N.W.
Washington, D. C. 20001
Victor Kramer, Executive Director
Robert Pitofsky, Chairperson
Founded: 1971

International Project 494,000
Center for Law and Social Policy
1751 N Street, N.W.
Washington, D. C. 20036
Richard Frank, Executive Director
Seymour Rubin, Chairperson
Founded: 1971

League of Women Voters Education Fund 659,370
1730 M Street, N.W.
Washington, D. C. 20036
Margaret Lampel, Executive Director
Ruth C. Clusen, Chairperson
Founded: 1973

Legal Action Center of the City of New York, Inc. 375,000
271 Madison Avenue
Room 108
New York, New York 10017
Elizabeth B. DuBois, Director
Arthur L. Liman, Chairperson
Founded: 1973

Natural Resources Defense Council 1,975,000
15 West 44th Street
New York, New York 10036
John Adams, Executive Director
Stephen P. Duggan, Chairperson
Founded: 1969

Public Advocates, Inc. 1,850,000
433 Turk Street
San Francisco, California 94120
Sidney Wolinsky, Managing Attorney
Howard Nemerovski, Chairperson
Founded: 1971

Sierra Club Legal Defense Fund, Inc. 433,000
311 California Street
San Francisco, California 94104
John Hoffman, Executive Director
Donald Harris, Jr., Chairperson
Founded: 1969

Women's Law Fund, Inc. 340,000
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115
Jane M. Picker, Director
Professor Lizabeth Moody Buchmann, Chairperson
Founded: 1972

Women's Rights Project 70,000
Center for Law and Social Policy
1600 20th Street, N.W.
Washington, D. C. 20009
Marcia D. Greenberger, Managing Attorney
Brooksley Landau, Esq., Chairperson
Founded: 1974

Research Center for the Defense of Public Interests 95,000
Bogotá
Colombia
Fernando Umana Pavolini, Director
Founded: 1974